TESTIMONY IN SUPPORT OF SENATE BILL 120
CONTROLLED GROUND WATER AREAS
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Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and present testimony in support of this important legislation. My name is John Tubbs, and I am the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation (Department). My Division is charged with implementing the Montana Water Use Act.

Senate Bill 120 provides crucial modifications and improvements to the current statutes providing for the designation and modification of controlled ground water areas (CGWA). §§85-2-506, and -507, MCA. CGWA's are areas where there are concerns over the effect of ground water withdrawals under current permit exemptions (primarily, not to exceed 35 gallons per minute and 10 acre-feet per year) and permits on the water resource, water quality, and the ability of current water right holders to continue to reasonably exercise their water rights. SB 120 replaces an antiquated process which does not reflect the complexities faced today with an efficient, cost-effective, rulemaking process that is generally recognizable to everyone and allows for broad public participation.

To understand why this Bill is crucial, it is important to understand the background of the CGWA statutes and recent proceedings. The current CGWA statutes were part of the 1961 Ground Water Code which predates the 1973 Montana Water Use Act, the 1972 Montana Constitution, and the 1971 Montana Administrative Procedure Act (MAPA). The statutes (§§85-2-506 and -507, MCA) embody a relatively simplistic procedure of an uncomplicated time that no longer exists. The statutes needs to be updated to reflect MAPA, used by all agencies, and twenty-first century administration of surface and ground water appropriations.

The current process can be initiated by petition alleging facts that indicate that the criteria for a CGWA are met. No actual evidence need be presented, but rather the Department is required to move forward on the basis of only allegations that such facts exist. A proposed CGWA is not restricted in size and can currently be initiated by Department on its own motion, by petition of a state or local public health agency for identified public health risks, or by petition signed by at least 20 or one-fourth of the users, whichever is the lesser number, of ground water in the proposed CGWA. Thus, under the current statute, a petition by 20 people could initiate a proceeding involving an unlimited area. For example, the Department has received petitions for up to 6343 acres (Smith Valley, Kalispell) and 52.5 square miles (North Hills, Helena). Once initiated the current process proceeds to a hearing, regardless of the existence or non-existence of any supporting evidence. A full fair and orderly proceeding for hearing in turn requires the exchange of information prior to hearing, although by virtue of the process many parties are not identified until they appear at the hearing. It is difficult to provide for advance

knowledge of the basis for a proposed CGWA due to the process provided in statute. After the hearing, the Department exercises its expertise, for the first time, to determine whether designation is warranted based on the evidence in the record.

The "full, fair and orderly proceeding" requiring all relevant oral and written evidence to be taken, is not tied to a defined process in MAPA. Due to increased controversy over water and development issues, we face a situation combining expert hydrologic evidence, attorneys, corporations, families, landowners, individuals and the list goes on. With the current statutes and the lack of a clear tie to MAPA, it is difficult for the lay public to participate in and understand the process, and it increasingly pits the lay public against parties who hire attorneys and expert witnesses, and who want to cross examine others who participate in the hearing. Members of the public are rightly concerned because the designation of CGWA's can affect a large number of landowners and interests. Recent CGWA hearings have been expensive, time consuming, and frustrating for all parties, including Department staff. The Bill is intended to address those concerns.

This Bill provides for a rulemaking process under MAPA. This brings the CGWA process in line with the rulemaking process provide for closing basins under §85-2-319, MCA. The rulemaking process is initiated only after evidence is presented to the Department that there is sufficient concern to warrant taking the issue to the public, i.e. initiate rulemaking. CGWA's are local concerns and this Bill focuses the initial discussion of those issues on local governments and agencies. With a rulemaking hearing, the Department would publish its basis for the proposed rule (establishment of a CGWA) and members of the public could comment. At the hearing, all members of the public can participate without fear of cross-examination and, yet, those with expert hydrologic evidence can present that evidence also.

More specifically, the process would flow as follows. The process is tied to MAPA and the Bill replaces the term "order" with the term "rule." A threshold level of evidence to initiate a rulemaking proceeding is required by a "correct and complete" petition be submitted to the Department. (Correct and complete requires substantial credible information addressing the criteria. §85-2-102, MCA) Correct and complete means that there is sufficient evidence in the petition for the Department to move forward in the process to evaluate the merits of the petition and whether to move forward with rulemaking. Recall under the current statute, the CGWA proceeding and hearing can be initiated with a simple allegation that a problem exists and requires no minimal level proof of a problem. (Page 11, lines 5-6). On page 12 of the Bill, the statute is amended to allow the Department to use its expertise to evaluate the petition and any other available information to determine whether a proposal of a rule establishing or modifying a CGWA is warranted. If the Department declines to move forward with rulemaking, it must provide a written justification of its decision not to move forward.

If the Department decides to go forward with a proposed rule, it not only provides for notice under MAPA, the Department must provide additional notice as required on pages 12-13 of the Bill. On pages 13-14, the Bill sets forth the criteria for the Department to

use in the evaluation of the petition and designation/modification of a CGWA. The criteria are revised to recognize current evidentiary techniques for evaluating impacts to ground water, interaction of surface water with ground water withdrawals, water quality, and protection to water right holders. The revised criteria confirm that a water right holder in the CGWA process is entitled to the same protections as water right holders outside a CGWA under the Montana Water Use Act, ex. §85-2-401, MCA. Again, in addition to the notice provided for any proposed rule, the Department would set forth its position on the criteria and the basis for the position prior to the rulemaking hearing. This way, all persons would have knowledge prior to any hearing of the information on which the Department is relying to move forward with the proposal. The new criteria also recognize that mitigation techniques may be employed to address impacts from ground water withdrawals.

The rulemaking process provides for open public participation for all persons potentially affected by a CGWA. Importantly, the rulemaking hearing and comment process would likewise allow for a range of evidence to be accepted. This would include evidence ranging from hydrologic experts to landowners who would just like to voice their opinion. With the rulemaking process comes the existing body of law which defines the process should there be any questions. Proposal of a rule does not necessarily mean that a rule designating/modifying a CGWA will be adopted. Like any rule, the Department may learn of information at the hearing and through public comment that warrants against designation/modification of a CGWA. As with the current statute, designation of a CGWA is within expertise of the Department, subject to judicial review.

The Bill continues to provide for the designation of temporary CGWAs to allow for further study. A designation maybe for up to 6 years (currently the designation is in 2-year increments up to 6 years). The Bill provides for data gathering controls during temporary designations and the full range of appropriation controls in current statutes for permanent CGWA's.

Importantly, the Bill allows for temporary CGWA's to be prioritized for study by the Montana Bureau of Mines and Geology in any ground water investigation program and for prioritized study funding under the renewable resource grant and loan program. One of the biggest challenges faced by proponents of CGWA's and the Department is funding for studies of temporary CGWA's.

The proposed petition process moves the focus of the ground water issues to the local level first. In the past, the Department has seen many petitions targeted to concerns over specific subdivision approvals and county growth policies. Because of the intertwined issues of local growth and water availability and quality, the Department believes that local governments (counties, municipalities, water quality districts, and conservation districts) and local health agencies (already part of the current statutes) should be involved in the CGWA process. Any designation by the Department will certainly affect local planning. While the Department recognizes that this petition requirement is a departure from the past petition process, the Department firmly believes that CGWA's work best when they have the by-in and support of the local governing body. The

The proposed process continues to provide for petitions by state health agencies such as the Department of Environmental Quality (DEQ). CGWA's have been an important device for DEQ to address ground water quality concerns in superfund sites.

Repealed Sections

The Department advocates repeal of sections §§85-2-507, -509, 511, 513, 518, and -520, MCA, for the following reasons.

- Section 85-2-507, MCA is unnecessary as a result of the Bill.
- Sections 85-2-509 and -511, MCA, create a potential conflict with the authority provided for the Montana Water Court after the passage of the Montana Water Use Act. The Montana Water Court has the authority to determine priority of water rights existing as of June 30, 1973, not the Department. The Department has authority over permits issued after that date.
- Section 85-2-513, MCA is unnecessary with the new rulemaking process.
- Section 85-2-518, MCA creates a potential conflict with administration of water rights by district courts. District courts through water commissioners have the authority to administer water rights in order of priority, Title 85, Chapter 5, MCA. Surface and ground water is a unitary resource and should be addressed together.
- Section 85-2-520 is unnecessary. The Montana Water Use Act already provides for penalties for violation of this chapter under §85-2-122, MCA.

In conclusion, we must remember that designation of CGWA's can be an important tool to address ground water development and health and safety issues. However, the current process simply isn't working. CGWA's provide a method that can focus on a specific problem in a specific geographical area. We recognize that the controlled ground water statutes have become problematic to implement in this day and age and we seek your help to improve the process. The process must be fixed if CGWA is to be a viable option. Thank you again for opportunity to comment on this legislation.